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NO. 82-5910

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1982

JOE LEWIS PERRY
PETITIONER

VS.

STATE OF LOUISIANA
RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

OPPOSITION BY

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In The
Supreme Court of The United States

October Term, 1982

No. 82-5910

Joe Lewis Perry
Petitioner

vs.

State of Louisiana
Respondent

OPPOSITION TO WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

Respondent, State of Louisiana, prays that the application for writ certiorari in the above captioned case be denied for the reasons set forth herein below.

Citations To Opinions Below

The opinion of the Louisiana Supreme Court of State v. Perry is reported at 420 So. 2d 139 (La. 1982).

Jurisdiction

The jurisdiction of this Honorable Court is being invoked by petitioner under 28 USC 1257(3).

Question Presented

The issue presented herein is if defendant has shown he was deprived of a fair and impartial trial by the prosecutor's use of peremptory challenges to exclude blacks from the petit jury.

Statement of The Case

Petitioner Joe Lewis Perry was tried and convicted in the Fourteenth Judicial District Court of the State of Louisiana for First Degree Murder and was thereafter sentenced to death. His conviction and sentence were affirmed

in a majority opinion of five of the Louisiana Supreme Court with two justices dissenting. Petitioner has now applied for writs to this Honorable Court.

Argument

Succintly, petitioner maintains that Swain v. Alabama, 380 U.S. 202 (1965) should be re-examined in light of later cases and this Honorable Court should "make a definitive statement as to what extent Swain may still apply where the prosecutor clearly and systematically removes blacks from a jury involving a capital case wherein a black defendant is accused of killing a white person."

Based upon such an argument it seems immediately evident that petitioner does not contend that the majority opinion of the Louisiana Supreme Court erred in its application of Swain whereby it rejected defendant's argument. On the contrary, it appears that he seeks a review of his position under a new and different standard than Swain. Petitioner urges this new standard should especially apply in a case as this involving a death sentence.

The views expressed by petitioner are basically those expressed in the two dissenting opinions to the majority opinion of the Louisiana Supreme Court and neither maintain that the majority opinion incorrectly interprets Swain but that Swain should not be controlling in a death penalty case.

Therefore, the State of Louisiana takes the position that under the controlling law as set forth in Swain v. Alabama, supra, there is no error in the majority opinion of the Louisiana Supreme Court. The majority decision under consideration points out that the Louisiana Supreme Court has consistently reiterated its adoption of the view expressed

in Swain requiring the defendant to prove systematic exclusion through the use of peremptory challenges over a period of time. Then the majority found it obvious from the transcript that defense counsel was not prepared to show exclusion of blacks from juries through the use of peremptory challenges over a period of time as required by Swain and, therefore, was unable to say the trial judge erred in denying defendant's motion to quash.

It appears in Swain, as in the instant case, defense counsel relied solely upon the striking of Negroes from the petit jury venire to support his motion. Therein this Honorable Court in rejecting defendant's position observed, "To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the Challenge." Significantly, this Honorable Court observed:

> ...The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegation that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroe. Any other rule we think would establish a rule wholly at odds with the peremptory challenge system as we know it. 380 U.S. at 222.

The State of Louisiana takes the position that this reasoning of this Honorable Court in Swain should apply in a case involving a death sentence, as that at bar, as it does to any other case. First and obviously, every defendant must be accorded equal protection of the law and a fair and impartial trial and if the rule insures this protection, in a case less than capital, as it does, there is no reason to depart from it in a case involving a death penalty.

Secondly, it is felt there would be difficulty in applying a different rule for peremptory challenges to a case with a possible death sentence than that applied to other cases. This is especially true in view of the fact that at that time of the selection of the jury it is not known if the trial will conclude in a death sentence. Consequently, it is urged there must be a uniform rule for the trial judge to follow in reviewing jury selction when there is a motion to quash based upon exclusion of an identifiable group by use of peremptory challenges.

In response to petitioner's argument that Swain has been superseded by later cases, it should be noted that in one of the very cases relied upon by petitioner for this position, People v. Wheeler, 583 P.2d 748 (Cal. 1978), the court therein stated the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground and then stated the issue was what showing is necessary to rebut it. In its reasoning the court related that it was true that Swain adjudicated the issue in terms of the equal protection clause of the Fourteenth Amendment rather than the impartial jury guarantee of the Sixth Amendment. However, despite this distinction the court observed, "We therefore assume if the present question were before the high court it would reaffirm Swain and reach the same result under the representative cross-section rule as it did under the equal protection clause." The case was then declared under the protection of the California Constitution and clearly does not demonstrate an erosion of Swain under the United States Constitution as decided by this Honorable Court.

Also with respect to petitioner's reliance upon Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979), cert. denied, 444 US 881 (1979), for the argument that Swain has

been repudiated, we see the court therein similarly stated the decision was based upon the Massachusette State Constitution, specifically pointing out, ". . . (W)e do not undertake consideration of whether the authority of Swain is undermined by Duncan or by such decisions as Taylor, or Peters, supra."

Moreover, the State of Louisiana must disagree with petitioner's argument that it is virtually impossible for a defendant to apply the strict rules enunciated in Swain. We note in State v. Washington, 375 So. 2d 1162 (La. 1979) that defense counsel moved for a mistrial following selection of the jury, and subsequently a motion for new trial and in arrest of judgment and for an evidentiary hearing to show a systematic exclusion of black jurors by the prosecutor in prosecutions involving black defendants and white victims. Despite testimony at the evidentiary hearing by an attorney that no data or records are maintained by which, as a statistical matter, it can be determined how many instances and when a prosector has used his peremptory challenges on a racial basis since the race of propective jurors is not reflected in official records, the defense presented the testimony of three attorneys with extensive trial experience with the prosecutor as to his use of peremptory challenges to exclude blacks. The prosecutor admitted to use of a large percentage of peremptory challenges of blacks but took the position he did it on the nature of the case, intelligence of the juror and how they could relate to him and the case and not on the basis of color. The Louisiana Supreme Court found the defendant had made a showing sufficient to establish a prima facie case of discrimination by that prosecutor's use of peremptory challenges for systematic exclusion, a continual and conscious rejection of blacks. Thus, it held the burden shifted to the State and it failed to carry its burden.

A similar conclusion was reached by the Louisiana Supreme Court in State v. Brown, 371 So. 2d 751 (La. 1979) and the conviction was reversed for exclusion of blacks by the prosecutor's use of peremptory challenges under Swain.

Based upon this kind of proof by the defendant it is evident that the Swain rule does not place a harsh or excessive burden upon a defendant so as to mandate a departure from that rule that balanced the rights of the defendant with the nature and operation of peremptory challenges and found an overriding presumption that the prosecutor is using the State's challenges to obtain a fair and impartial trial.

Additionally, the State of Louisiana takes the position that the record of the instant case fully establishes that it does not merit the attention of this court by granting writs. A persual of the transcript demonstrates that Negroes were not excluded simply according to their race by the prosecution in this or other cases. This is substantiated in the transcript, as observed by the Louisiana Supreme Court's majority opinion, that defense counsel did not contend there was a systematic exclusion of blacks in any case other than the instant case. Moreover, at the time the prosecution offered evidence of jury selection in her prior trials but the trial judge found no need for a hearing. He overruled the motion with the comment that he had been presiding in the Court for a number of years and in his observation "there is no exclusion. They are on the jury many, many times."

In summary, it is urged Swain is a reasonable rule that is susceptible to proof without undue burden. It adequately insures defendant not only equal protection but a fair and impartial trial while recognizing the concept developed by use of peremptory challenges.

Thus, in conclusion the State of Louisiana urges that the well thoughtout reasoning of Swain v. Alabama, supra, be continued in full force and effect and based thereon the instant writ be denied.

Conclusion

For the reasons set forth herein above the State of Louisiana urges the application of Swain v. Alabama, supra, to thereby dismiss the present application as lacking merit to be reviewed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleadings has been forwarded to all parties through their counsel of record by depositing a copy of same in the U.S. Mail, postage prepaid, this 18th day of February, 1983.

Barbara B. Rutledge
ASSISTANT ATTORNEY GENERAL